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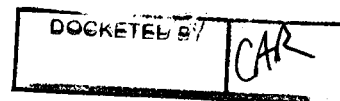
BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
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CommissionerWILLIAM MUNDELL
CommissionerJEFF HATCH-MILLER
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Commissioner

Arizona Corporation Commission

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FEB 04 2003



IN THE MATTER OF THE GENERIC
INVESTIGATION INTO U S WEST
COMMUNICATIONS, INC.'S COMPLIANCE
WITH CERTAIN WHOLESALE PRICING
REQUIREMENTS FOR UNBUNDLED
NETWORK ELEMENTS AND RESALE
DISCOUNTS.

DOCKET NO. T-000004-00-0194

ARIZONA CORPORATION COMMISSION,

DOCKET NO. T-01051B-02-0871

Complainant,

v.

QWEST CORPORATION,

Respondent.

QWEST'S OPPOSITION TO MTI'S MOTION FOR INJUNCTION

Qwest Corporation ("Qwest") hereby files its Opposition to a Motion for Injunction filed in the above-referenced proceedings by Mountain Telecommunications, Inc. ("MTI") on January 16, 2003 (the "Motion"). MTI's Motion requests that the Commission "enjoin Qwest...from charging unjust and unreasonable prices to MTI for unbundled network elements." Motion, pg. 1. MTI also asked the Commission to stay the effective date of rules established in Decision 64922 (June 12, 2002) for pricing transport facilities. For the reasons set forth below, Qwest asserts that

1 there is no legal or policy basis for the extraordinary relief requested by MTI. MTI's Motion
2 should be denied.

3 **I. The Commission's Order to Show Cause Proceeding is An Inappropriate**
4 **Forum For A Grant of Injunctive Relief**

5 As Qwest noted in its Response to MTI's Motion for Intervention in this proceeding (the
6 "Response"), the Commission established the wholesale rate implementation OSC for an
7 important, but narrow purpose: to evaluate Qwest's actions, and related procedures, associated
8 with implementation of the Commission's June 12, 2002 Order (the "Phase II Order"). The issue
9 raised by MTI – that the Commission's adoption of Direct Trunk Transport rates generated by the
10 HAI model has resulted in rates that "are far higher than the previously-applicable charges for
11 that service"¹ – is wholly unrelated to the Commission's focused investigation of Qwest's
12 wholesale rate implementation procedures. Quite simply, the OSC was not established for the
13 purpose of review of the Commission's decisions regarding particular wholesale rates adopted in
14 the Phase II Order. By extension, a grant of injunctive relief precluding implementation of rates
15 adopted in the Phase II Order would be extraordinary, unwarranted, and far beyond the scope of
16 review set forth by the Commission for this proceeding. In essence, under the cloak of claims
17 regarding alleged Qwest anti-competitive conduct, MTI seeks to collaterally attack the
18 Commission's rate determinations in the Phase II Order.

19 Over the past two months, in several public statements regarding the OSC, the
20 Commission has expressed its dissatisfaction with the wholesale rate implementation process,
21 mandated that a full investigation occur, and declared that appropriate process improvements will
22 be implemented.² In response, Qwest has publicly expressed its desire to work expeditiously and,
23 to the extent possible, cooperatively with Staff to resolve the implementation issues raised in the
24

25 ¹ Application, pg. 3, emphasis in original.

26 ² See, e.g., Comments of Commissioners Spitzer and Mundell, RT-00000F-02-0271, December 13, 2002 Procedural
Conference, Transcript pp. 9-13.

1 OSC.³ MTI's Injunction request seeks to hijack this focused administrative process for the
2 purpose of litigating issues more properly the subject of a Motion to Re-Open the proceedings, or
3 a Motion for Reconsideration. Indeed, the Commission's Application for Rehearing process, as
4 set forth in A.R.S. 40-253, is the only mechanism that provides for Commission issuance of a stay
5 of its previously-issued orders. As MTI acknowledges, the procedural deadline for any such filing
6 has long since passed. As discussed further below, even were MTI able to meet statutory filing
7 deadlines, the circumstances present do not support a stay of implementation of any rates
8 established in the Phase II Order. In this regard, Qwest concurs in the January 31, 2003 Response
9 filed by AT&T to MTI's Motion for Injunction. AT&T Motion succinctly sets forth the legal
10 obstacles to MTI's attempt to collaterally attack the Commission's Phase II Order (pp. 2-5), and
11 Qwest will not repeat these arguments and related citations here. However, the record clearly
12 demonstrates that there simply is no basis for injunctive relief.⁴

13 14 **II. MTI Is Not Entitled To Preliminary Injunctive Relief.**

15 In its Motion, MTI correctly identifies the four factors the Commission must examine in
16 evaluating a request for injunctive relief:

- 17 • Whether the applicant has made a strong showing of likelihood of success on the merits
- 18 • Whether the applicant will be irreparably harmed absent an injunction
- 19 • Whether the grant of injunction will substantially injure other interested parties
- 20 • Where the public interest lies

21 MTI's Motion fails to carry its burden on all four factors.

22 **A. MTI is unlikely to succeed on the merits.**

23 In order to succeed in obtaining injunctive relief, MTI must show a likelihood of success
24 on the merits and the possibility of irreparable harm. *Walczak v. EPL Prolong, Inc.*, 198 F. 3rd

25 _____
26 ³ Ibid., Comments of Qwest Arizona State President Pat Quinn, pp. 6-8.

1 725, 731 (9th Cir. 1999). Mere economic loss does not constitute irreparable harm for purposes of
2 obtaining preliminary injunctive relief. *Colorado River Indian Tribes v. Town of Parker*, 776
3 F.2d 846, 850-51 (9th Cir. 1985).

4 To support its claim of likely success on the merits, MTI inexplicably contends
5 that by implementing Commission-approved rates for Direct Trunk Transport and Local
6 Interconnection Service, Qwest has engaged in charging “unjust or unreasonable” rates to its
7 customers, in violation of Section 201(b) of the Communications Act and A.R.S. Section 40-361.
8 MTI blithely ignores that Commission-approved rates, if adopted in conformance with due
9 process norms, are by definition “just and reasonable.” As Qwest pointed out in its Response, the
10 adopted rates in question are the result of an extensive and time-consuming evaluation of
11 numerous wholesale rates generated by competing cost models submitted by parties in Phase II of
12 this proceeding. The Commission’s Order explicitly addressed concerns raised by the parties
13 regarding using the HAI model to set applicable transport rates and determined that:

14
15 We believe that consistency requires adoption of the HAI model’s results for both loop
16 costs and transport. As Qwest points out, any UNE pricing inquiry necessarily involves
17 some cost averaging among different kinds of facilities. Even loop costs within a given
18 zone require averaging of costs for different loop lengths within that zone. Accordingly,
19 we will adopt the HAI model’s results for purposes of pricing transport in this
20 proceeding...Although we are adopting the HAI model’s results at this time, we believe
21 that this issue should be re-examined in Phase III so that a full record may be developed.⁵

22 Clearly, in its Phase II Order the Commission considered the effect of implementing the
23 rates under discussion, made a determination, and also set forth a specific procedural framework
24 for re-examination of that decision. While MTI, a non-participant in any aspect of the Phase II
25 hearing process, now may find the Commission’s determination objectionable, such objections do
26 not support its contention either Qwest, or the Commission, implemented rates for Transport and
Local Interconnection Service that do not “comply with the pricing standards codified in Section

⁵ Decision No. 64922, pg. 79.

1 252 of the Communications Act...and with the FCC's TELRIC pricing rules."⁶

2 Indeed, Qwest has conducted a review of its December 2002 and January 2003 invoices to
3 MTI subsequent to its implementation of the Phase II Order, and reiterates that it has correctly
4 calculated and billed MTI for the DTT transport and Local Interconnection Service Rate(s) as
5 well as for all other unbundled recurring and non-recurring elements, consistent with the
6 Commission's Order. Qwest avers that all rate table changes for CLECs were implemented at the
7 same time. Any rate increases or decreases for DTT and Local Interconnection services MTI
8 experienced as a result the Phase II Order were implemented simultaneously. Qwest has
9 identified no basis for MTI's contention that Qwest has sporadically and selectively implemented
10 Local Interconnection or "loop" rates for MTI. Qwest has acknowledged, and the Commission is
11 now well aware, that these rate changes occurred for all CLECs beginning in December 2002, six
12 months after the effective day of the Phase II Order.

13 More importantly, the rates set by this Commission for Transport and for Local
14 Interconnection Service meet the requirements of the Federal Communications Act of 1996 ("the
15 1996 Act"), related FCC TELRIC rules and the anti-discrimination requirements of Section 201
16 of the Act. In this instance, after substantial review and argument, the Commission simply
17 followed the Staff and CLEC request to implement the HAI model. In determining that it must
18 apply its adopted model consistently, the Commission adopted HAI-generated transport rates to
19 match the selection of HAI loop rates. Consistent application of an adopted economic model is
20 both just and reasonable. Qwest's implementation of rates in accordance with the Commission's
21 Order is mere compliance, not potentially anti-competitive activity, as MTI contends.

22 MTI nevertheless seeks to improperly link its dissatisfaction with the rates adopted by the
23 Commission to Qwest's purportedly tardy implementation timeframe and processes. The latter is
24 properly the focus of the OSC; the former is not. Since the rates implemented were Commission-

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26 ⁶ MTI's Reply to Qwest's Response to MTI's Application for Intervention, pg. 3.

1 approved, MTI's likelihood of success on the merits – in receiving a reduction in applicable rates
2 due to malfeasance on Qwest's part – is low. MTI correctly notes that the Commission may, on
3 its own Motion or in response to a party request, re-open the record or alter or amend a previous
4 decision. The Commission has the authority, assuming procedural due process requirements are
5 met, to take such action. There is, however, simply no legal or policy basis for doing so in the
6 context of the OSC proceeding, particularly where the Commission has already agreed to revisit
7 the rates in Phase III of the Cost Docket.

8
9 **B. MTI Faces No Irreparable Harm**

10 To support its extraordinary request for injunctive relief, MTI cites severe economic harm.
11 As Arizona courts consistently have held, mere economic loss does not constitute irreparable
12 harm for purposes of obtaining preliminary injunctive relief. *Colorado River Indian Tribes v.*
13 *Town of Parker*, 776 F.2d 846, 850-51 (9th Cir. 1985). In order to avoid this clear limitation on
14 circumstances constituting irreparable harm, MTI claims that “[c]ontinued imposition on MTI of
15 the transport rates and local loop rates reflected in Qwest's recent invoices will make it
16 uneconomic for MTI to offer competing local telecommunications services through use of
17 unbundled network elements...” Motion, pg. 5. MTI's argument acknowledges both that (1) any
18 alleged injury to MTI is wholly economic in nature, and (2) since Qwest only recently
19 implemented the rate changes in question, MTI thus far has incurred little, if any, actual economic
20 harm at all. The extent of purported “harm” MTI may experience as a result of Phase II Order rate
21 changes is dependant on when the Commission's scheduled Phase III re-evaluation of the Direct
22 Trunk Transport rate occurs, and whether after a full review with participation of all interested
23 parties, the Commission decides to modify the rate at all. Accordingly, MTI's purported harm is
24 speculative at best. More importantly, the only harm that MTI claims to suffer is an economic
25 loss, simply not suitable for injunctive relief.

1 **C. An Injunction Would Substantially Injure Other Interested Parties**
2 **and Not Further The Public Interest**

3 The purpose of injunctive relief is to deter, not to punish. *Rondeau v. Mosinee Paper*
4 *Corporation*, 422 U.S. 49, 95 S. Ct. 2069, 45 L. Ed. 2d 12 (1975). What MTI seeks to deter here
5 is Qwest rightfully implementing rates approved by the Commission because it contends that
6 these new Commission-approved rates will cause it economic harm. This is not the purpose of
7 injunctive relief.

8 More importantly, MTI's requested relief would severely harm the interests of all parties
9 who chose to participate in the Phase II proceedings, and undermine the integrity of the
10 Commission's administrative hearing process. At the January 27, 2003 Procedural Conference,
11 MTI admitted it was aware of wholesale cost proceedings and made a decision not to participate.
12 As the record indicates, concerns regarding Commission treatment of the rates in question have
13 been under discussion for over a year. In spite of the apparent importance of these rates to MTI's
14 business, the company did not intervene in the case, did not submit any testimony offering input
15 during the proceeding and was not involved in Phase II hearing. MTI now requests that this issue
16 not only be addressed immediately, but also considered in the context of an OSC proceeding that
17 focuses on wholly distinct factual matters. This request is extraordinary, inconsistent with the
18 Commission's directives, would set a dangerous precedent for the orderly handling of future
19 proceedings of this nature.

20 As a practical matter, granting MTI's request possibly would subject all rates adopted in
21 the Phase II Order to similar collateral attack, leading to an inefficient use of both Commission
22 and party resources. Such a result would not further the public interest.

23 **III. Qwest Does Not Oppose MTI's Intervention in Phase III of the Wholesale**
24 **Cost Proceeding**

25 As noted in its Response to MTI's Motion for Intervention (January 21, 2003), although
26

1 premature, Qwest does not at this time oppose MTI's proposed intervention in Phase III of the
2 wholesale cost proceeding. The Commission has established that proceeding for re-examination
3 of the issues raised by MTI. Qwest believes that the Commission's approach is reasonable, and
4 should not be altered at this time. Qwest also does not oppose expedited Commission scheduling
5 of evidentiary hearings in that docket.
6

7
8 **IV. Conclusion**

9 Based on the foregoing, MTI has not demonstrated and cannot demonstrate that there is a
10 legal or policy basis supporting its extraordinary request for an injunction precluding Qwest from
11 implementing Commission-approved wholesale rates in accordance with the Phase II Order. The
12 Commission therefore should deny MTI's Motion for Intervention. Qwest does not oppose MTI's
13 request for intervention in the Phase III docket, where these issues may be fully addressed by all
14 parties.
15

16 DATED this 4th day of February, 2003.

17
18 FENNEMORE CRAIG

19
20 By 

21 Timothy Berg
22 Theresa Dwyer
3003 North Central Avenue, #2600
Phoenix, AZ 85012-2913

23 -and-

24 QWEST CORPORATION
25 Mark Brown
3033 N. 3rd Street
Phoenix, AZ 85012

26 *Attorneys for Qwest Corporation*

1 ORIGINAL and 15 copies of the
2 foregoing hand-delivered for
filing this 4th day of February , 2003 to:

3 Docket Control
4 ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

5 COPY of the foregoing hand-delivered
6 this 4th day of February, 2003 to:

7 Maureen Scott
Legal Division
8 ARIZONA CORPORATION COMMISSION
1200 West Washington
9 Phoenix, Arizona 85007

10 Christopher Kempley
Legal Division
11 ARIZONA CORPORATION COMMISSION
1200 West Washington
12 Phoenix, Arizona 85007

13 Dwight D. Nodes
Hearing Division
14 ARIZONA CORPORATION COMMISSION
1200 West Washington
15 Phoenix, Arizona 85007

16 Lyn Farmer
Hearing Division
17 ARIZONA CORPORATION COMMISSION
1200 West Washington
18 Phoenix, Arizona 85007

19 Ernest Johnson
Utilities Division
20 ARIZONA CORPORATION COMMISSION
1200 West Washington
21 Phoenix, Arizona 85007

22 COPY of the foregoing mailed
23 this 4th day of February, 2003 to:

24 Steven J. Duffy
RIDGE & ISAACSON, P.C.
3101 North Central Avenue, Ste. 1090
25 Phoenix, Arizona 85012-2638
26

- 1 Richard S. Wolters
M. Singer-Nelson
2 AT&T
1875 Lawrence Street, Room 1575
3 Denver, CO 80202-1847
- 4 Michael W. Patten
ROSHKA HEYMAN & DEWULF
5 400 E. Van Buren Street, Suite 800
Phoenix, AZ 85004
- 6 Michael Grant
7 Todd C. Wiley
GALLAGHER & KENNEDY
8 2575 E. Camelback Rd.
Phoenix, AZ 85016-9225
- 9 Thomas H. Campbell
10 LEWIS & ROCA
40 N. Central Avenue
11 Phoenix, AZ 85007
- 12 Brian S. Thomas
TIME WARNER TELECOM
13 520 SW Sixth Ave., Suite 300
Portland, OR 97204-1522
- 14 Thomas F. Dixon
15 WORLDCOM
707 17th Street
16 Denver, CO 80202
- 17 Eric S. Heath
SPRINT COMMUNICATIONS CO.
18 100 Spear Street, Suite 930
San Francisco, CA 94105
- 19 Scott S. Wakefield
20 RUCO
1110 West Washington, Suite 220
21 Phoenix, AZ 85007
- 22 Ray Heyman
ROSHKA HEYMAN & DeWULF
23 400 E. Van Buren Street, Suite 800
Phoenix, AZ 85004
- 24 Rex M. Knowles
25 XO Communications, Inc.
111 E. Broadway, Suite 1000
26 Salt Lake City, UT 84111

- 1 Megan Doberneck
2 COVAD COMMUNICATIONS COMPANY
3 7901 Lowry Boulevard
4 Denver, Colorado 80230
- 5 Lisa Crowley
6 COVAD COMMUNICATIONS COMPANY
7 4250 Burton Drive
8 Santa Clara, CA 95054
- 9 Greg Kopta
10 DAVIS WRIGHT TREMAINE LLP
11 2600 Century Square
12 1501 Fourth Avenue
13 Seattle, WA 98101-1688
- 14 Mary S. Steele
15 DAVIS WRIGHT TREMAINE, LLP
16 2600 Century Square
17 1501 Fourth Avenue
18 Seattle, WA 98101-1688
- 19 Dennis Ahlers
20 Senior Attorney
21 ESCHELON TELECOM, INC.
22 730 Second Avenue South, Suite 1200
23 Minneapolis, MN 55402
- 24 Steve Sager, Esq.
25 MCLEODUSA TELECOMMUNICATIONS SERVICE, INC.
26 215 South State Street, 10th Floor
Salt Lake City, Utah 84111
- Marti Allbright, Esq., Esq.
MPOWER COMMUNICATIONS CORPORATION
5711 South Benton Circle
Littleton, CO 80123
- Penny Bewick
NEW EDGE NETWORKS
PO Box 5159
3000 Columbia House Blvd.
Vancouver, Washington 98668
- Michael B. Hazzard
KELLEY DRYE AND WARREN
1200 19th Street, NW
Washington, DC 20036

1 Janet Livengood
Z-TEL COMMUNICATIONS, INC.
2 601 South Harbour Island
Suite 220
3 Tampa, Florida 33602

4 Andrea Harris
ALLEGIANCE TELECOM
5 2101 Webster
Suite 1580
6 Oakland, CA 94612

7 Traci Grundon
DAVIS, WRIGHT TREMAINE, LLP
8 1300 S. W. Fifth Avenue
Portland, OR 97201

9 Joan Burke
10 OSBORN MALEDON
2929 N. Central Avenue
11 Phoenix, AZ 85012

12 Jacqueline Manogian
MOUNTAIN TELECOMMUNICATIONS, INC.
13 1430 W. Broadway Road, Suite A200
Tempe, AZ 85282

14 Darren S. Weingard
Stephen H. Kukta
15 SPRINT COMMUNICATIONS CO
16 1850 Gateway Drive, 7th Floor
San Mateo, CA 94404-2467

17 Jeffrey W. Crockett
18 Jeffrey B. Guldner
SNELL & WILMER
19 One Arizona Center
Phoenix, AZ 85004-2202

20 Joyce B. Hundley
21 Unites States Department of Justice - Antitrust Division
City Center Building
22 1401 H. Street, NW, Suite 8000
Washington, DC 20530

23
24
25
26

1 Lyndon J. Godfrey
2 AT&T
3 111 W. Monroe, Suite 1201
4 Phoenix, AZ 85003

5 E. Jeffrey Walsh
6 Greenberg Traurig
7 2375 E. Camelback Road
8 Suite 700
9 Phoenix, AZ 85016

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

